LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 18 1971
E. ROBERT SEAVER, CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-677

JAMES MELVIN WILCOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD M. GALE
518 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

and

HARRY W. PREBISH
1207 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

Attorneys for Petitioner

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CERTIFICATE OF SERVICE	16

APPENDIX

Appendix A	*Opinion of Fifth Circuit*	App. 1
Appendix B	*Judgment of Fifth Circuit*	App. 25
Appendix C	*Denial of Petition for Rehearing*	App. 26
Appendix D	*Judgment and Commitment*	App. 27

CITATIONS

	Page
Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)	12
Hoffman v. United States, 341 U.S. 479, 95 L.Ed. 1118, 71 S.Ct. 814	7, 8, 9, 10
McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)	12
Mesarosh v. United States, 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1	13, 14
Reina v. United States, 364 U.S. 507, 5 L.Ed.2d 249, 81 S.Ct. 260	11
Rogers v. United States, 340 U.S. 367, 95 L.Ed. 344	12
United States v. Hoffman, 7 Cir. 1967, 385 F.2d 501	11
United States v. Romero, 2 Cir. 1957, 249 F.2d 371	11
Wilcox v. United States, 5 Cir. 1967, 387 F.2d 60	4

CONSTITUTION OF THE UNITED STATES

Fifth Amendment	3

UNITED STATES CODE

18 U.S.C. § 473	3

in the

Supreme Court

of the

United States

OCTOBER TERM, 1971

No. _____

JAMES MELVIN WILCOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, James Melvin Wilcox, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 9, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix. The judgment and commitment entered by the United States District Court for the Southern District of Florida is unreported and appears in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 9, 1971. A timely petition for rehearing was denied on October 20, 1971. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I

Whether the Court of Appeals improperly restricted the scope of inquiry as to the reasons the Government witness was invoking the privilege against self-incrimination where he had pled guilty to the same offense as is here in question and had testified fully at a prior trial.

II

Whether the Government witness by pleading guilty, by being convicted of the same offense as is here in question and by fully incriminating himself by his prior trial testimony is estopped from invoking the Fifth Amendment.

III

Whether the Government's admission that its key witness has the right to invoke the Fifth Amendment since it is "a fact that he could commit perjury" by testifying at the third trial wholly discredits the witness' credibility so that the dignity of the United States Government will not permit the conviction based on the tainted first trial testimony.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent part of the Fifth Amendment to the Constitution of the United States provides:

> "No person *** shall be compelled in any criminal case to be a witness against himself ***."

STATEMENT OF THE CASE

Petitioner, Wilcox, was indicted in 1966 for transfering counterfeit reserve notes with knowledge of their unauthenticity in violation of 18 U.S.C. § 473. In 1967 Wilcox was convicted by a jury of the counterfeiting charge.

During his first trial, Maruzewski, the Government's chief witness and the party to whom Wilcox allegedly had transferred the counterfeit notes, gave testimony which gravely inculpated both Wilcox and himself.[1]

The bulk of Maruzewski's testimony at the first trial concerned his relationship with Wilcox and their subsequent arrangement whereby Maruzewski would be supplied with counterfeit bills from Wilcox on a consignment basis.

Maruzewski's highly incriminating testimony was to the effect that he was forwarded $10,000 in counterfeit currency by Wilcox, all in twenty dollar bills. The former

[1] Inasmuch as the Fifth Circuit's opinion sets forth most of the pertinent facts and proceedings, the Statement of the Case is supported by the opinion.

then journeyed through Louisiana and up to Detroit, Michigan, passing the bills until he was apprehended by federal agents in Detroit, Michigan. At the time of his arrest he was still in possession of some of the illicit currency.

Subsequently Maruzewski was returned to Fort Lauderdale to assist in the investigation and apprehension of Wilcox. Pursuant to a telephone conversation, Maruzewski went to Wilcox's house. He was accompanied by an agent Rivers, who posed as "Mad Dog", an alleged friend of Maruzewski. During this visit Maruzewski handed a number of counterfeit bills to Wilcox, who accepted them and put them in an envelope.

At the time Maruzewski testified to the foregoing in 1967, during the first trial, *he had already pleaded guilty as an accomplice to the counterfeiting charge here in dispute. Also, he had already been convicted and paroled.* After being paroled, he commenced serving a sentence in a state prison for another unrelated, intervening counterfeiting conviction. Because of the intervening state conviction, the Federal authorities revoked Maruzewski's parole in the instant offense and placed a detainer on him.

As a result of Maruzewski's "devastating testimony", which was corroborated in part by the secret service agents as to what occurred after Maruzewski's arrest, Wilcox was convicted of the counterfeiting charge. On appeal the Court of Appeals reversed the first conviction for improper cross-examination of certain character witnesses and remanded the cause for a new trial. *Wilcox v. United States*, 5 Cir. 1967, 387 F.2d 60.

A new trial was held, but it terminated in a mistrial at the time of opening argument to the jury because counsel for one of the parties mentioned that Maruzewski was not present and would not appear to testify.

Improper Invocation of the Fifth Amendment

When this case came on to be tried for the third time the Government's prosecutor advised the District Judge of Maruzewski's reluctance to testify. Accordingly, the Court convened a post-voir dire, pretrial conference to attempt to determine whether the witness intended to invoke the privilege against self-incrimination and whether the witness had a valid reason for doing so. At the commencement of this hearing the District Judge stated that Maruzewski had an absolute right to invoke the Fifth Amendment.[2] Defense counsel disagreed and objected to the position taken by the court.[3]

In reply to defense counsel's argument, the prosecutor admitted candidly that Maruzewski could commit perjury if he were to testify.[4]

---

[2]"THE COURT: 'Well, I would normally be of the opinion that having once testified he has waived the Fifth Amendment. The cases, seem to hold differently. They seem to hold that even though a witness has testified in one proceeding, if the case come back and is retried, he has an absolute right at the next trial to invoke the Fifth Amendment. That is what I say the law is." *U.S.A. v. Wilcox*, Appendix A, footnote 10.

[3]Defense counsel argued that Maruzewski must have "a reasonable ground to believe that his testimony will have the tendency to incriminate him. And he has already served his time on everything that is connected with this case." Ibid.

[4]Ibid.

The Court of Appeals assumed that the District Judge believed that Maruzewski was afraid that the testimony he would give at the third trial would show that he gave false testimony at the first trial, since the Judge in his exchange with counsel stated that the invocation of the Fifth was not available if the witness were afraid that he would perjure himself by testifying at the third trial.[5]

Notwithstanding the Court's statement that the privilege was not available to Maruzewski if he were afraid that he would perjure himself at the third trial, defense counsel was prohibited from making any inquiry during his examination of Maruzewski as to whether or not his fear of committing perjury in the third trial was the reason he was claiming the protection.[6]

Next, defense counsel attempted to ascertain if Maruzewski's reason for invoking the privilege was fear of further prosecutions by the Government in connection with his counterfeiting activities.[7] Although Maruzewski stated that he was not fearful of government prosecution at this time, an attempted profer by defense counsel to have Government counsel state in the record, or as a witness, that the latter has no knowledge of any kind that there is any intention on the Government's part to

---

[5] Id., at footnote 11.

[6] "[Defense Counsel]: Is one of your concerns which has caused you to seek to invoke the Fifth Amendment and refuse to testify possible prosecution and punishment for perjury?

"[Prosecutor]: I would like to voice an objection to the question. I don't believe it is relevant to these proceedings.

"THE COURT: I will sustain the objection ***." (R 29)

[7] *U.S.A. v. Wilcox*, Appendix A, footnote 7.

prosecute the witness for any crime that might be involved as a result of his testimony was denied by the Court at the Government's behest.[8]

Finally, the Government admitted that its "questions [would] be along the same line, to cover the same material that was covered in the original examination."[9]

Because the District Judge incorrectly permitted Maruzewski to invoke the Fifth Amendment privilege against self-incrimination, the latter became unavailable as a witness at the third trial, and his testimony from the first trial was read into the record before the jury.

REASONS FOR GRANTING THE WRIT

I

THE SUPREME COURT HAS JURISDICTION TO REVIEW BY CERTIORARI A DECISION OF THE COURT OF APPEALS ACCEPTING THIS COURT'S DECISION IN *HOFFMAN v. UNITED STATES*, 1951, 341 U.S. 479, AS CONTROLLING PRECEDENT BUT ATTRIBUTING TO THAT DECISION AN ERRONEOUS PRINCIPLE OF LAW RESULTING IN THE CREATION OF A CONFLICT OF OPINION AND AUTHORITY.

Hoffman v. United States, 341 U.S. 479, 95 L.Ed. 1118, 71 S.Ct. 814, provides the guidelines for a District

[8] Ibid.

[9] Id., at footnote 8.

Judge to determine the incriminating effect of an answer where a witness invokes the privilege against self-incrimination. First, Hoffman makes it abundantly clear that the witness, upon interposing his privilege, is not required to prove why an answer might incriminate since this would compel him to surrender the very protection which the privilege is designed to guarantee. Id., at p. 1124.

Since the Court cannot directly inquire of the witness as to the nature of the danger he senses, *Hoffman* provides that the witness must make it evident from the implications of the question in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. Ibid. Thus, under the principles announced in Hoffman, the witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself, it is for the Court to determine whether the witness has reasonable cause to apprehend danger from a direct answer. Ibid.

Accepting the principles of law announced in *Hoffman, supra*, and the further principle that the trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence, the Fifth Circuit attributed to the decision an erroneous and unfounded principle of law as follows: In analyzing the circumstances that the District Judge considered in ruling upon the witness' claim of privilege in *Hoffman, supra*, the Fifth Circuit noted that the recalcitrant witness in *Hoffman* was being sought for his connection with crimes being investigated by the Grand Jury, and answers to the Grand Jury's questions would have a strong possibility of implicating the witness

for some of the crimes under investigation. Also, in *Hoffman*, the conclusion of potential incrimination was buttressed by the Judge's knowledge that the witness had a long police record and was widely recognized as a key member of the organized criminal underworld.

Then, the Fifth Circuit found that the District Judge in analyzing the circumstances in ruling upon Maruzewski's claim had knowledge that Maruzewski had been convicted of another counterfeiting offense; that Maruzewski's counsel had advised him that there were other offenses for which he could be prosecuted; that Maruzewski's chief occupation involved the evasion of criminal laws. Further, the Judge was cognizant of the Government's refusal to disclose whether or not it had plans to prosecute Maruzewski after Wilcox's third trial. Upon the foregoing circumstances, the Fifth Circuit erroneously concluded that a further inquiry as to Maruzewski's reasons for fearing possible incrimination would be impermissible under *Hoffman*, *supra*, in view of the substantial danger of incrimination.

In appraising the claim of the privilege in the case, *sub judice*, the facts and circumstances are strikingly dissimilar from those in *Hoffman*, except that Maruzewski and the *Hoffman* witness were involved in criminal activities. In the case, *sub judice*, Maruzewski had pled guilty to the same counterfeiting charge facing Wilcox. The former had already testified fully at the first trial and had incriminated himself.

To the contrary, the witness in Hoffman was under investigation, had not been indicted, had obviously not pleaded guilty and had not voluntarily incriminated himself by testifying. Thus, inquiry as to the reasons for invoking the privilege in Hoffman, was necessarily re-

stricted to protect the witness in the exercise of his Fifth Amendment right, which had never been waived.

It is apparent that this Court never intended in the *Hoffman* decision to limit unduly the scope of inquiry as to the reasons a (Government) witness attempts to invoke the privilege against self-incrimination where he has already pleaded guilty to the very offense, which he is being called to testify about and which offense he has testified about at a prior trial.

Other facts present in the case, *sub judice*, and absent from *Hoffman* are that the Government raised the possibility of Maruzewski committing perjury if he testified and that the Government was deliberately silent as to possible prosecutions of Maruzewski if he were to testify at the third trial. Further important facts peculiar to this case are the Government's revocation of Maruzewski's parole and the Government's admission that it would seek to elicit essentially the same testimony as Maruzewski revealed in the first trial.

Therefore, the Fifth Circuit applied an erroneous and unfounded principle of law to *Hoffman*. For the Hoffman decision does not compel a restricted inquiry as to the reasons Maruzewski made his claim. Under the principles announced in *Hoffman*, inquiry should have been permitted as to whether or not the Government intended to prosecute Maruzewski if he testified at the third trial, as to whether or not Maruzewski invoked his privilege because of dissatisfaction with the Government's revocation of his parole and the detainer placed on him, and as to whether Maruzewski was afraid that he would perjure himself when he testified at the third trial.

Quite plainly, conflict of opinion has been demonstrated justifying the grant of certiorari to review the judgment and opinion of the Fifth Circuit. Further, the erroneous principles of law announced by the Fifth Circuit demonstrate the need in this important area of Federal law for this Court, by further elucidation, to set forth the extent of inquiry permissible to establish the incriminating effect of an answer where the witness invokes the privilege against self-incrimination.

II

THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS AS TO THE WAIVER OF THE PRIVILEGE AGAINST SELF-INCRIMINATION AFTER A PLEA OF GUILTY AND A CONVICTION.

It is well established that once a witness has been convicted for the transactions in question, he is no longer able to claim the privilege of the Fifth Amendment and may be compelled to testify. *United States v. Romero*, 249 F.2d 371, 374-375 (2 Cir. 1957). The Supreme Court of the United States in *Reina v. United States*, 364 U.S. 507, 5 L.Ed. 2d 249, 81 S.Ct. 260, approved the holding in *Romero* "that once a person is convicted of a crime he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime * * *."

To the same effect is the case of *United States v. Hoffman*, 385 F.2d 501, 504 (7 Cir. 1967), where the Court held that conviction of an accomplice under a plea of guilty

divested the accomplice of his Fifth Amendment right to refuse to testify concerning the transactions and events involved and subjected him to being called by the Government as a witness against his co-accomplices.[10]

Notwithstanding the applicability of the above authorities as to the effect of Maruzewski's plea of guilty, his conviction and prior testimony, the Fifth Circuit held that Maruzewski's situation was only a waiver as to the "exact words stated on the first trial."

Certainly, the District Judge should have required Maruzewski to testify at the third trial and, at least, to answer every question that was asked at the first trial. Maruzewski could still claim the privilege whenever a question was presented concerning a matter not involved in the first trial which would give rise to a reasonable danger of further incrimination in light of all the circumstances. Cf. *Rogers v. United States*, 1950, 340 U.S. 367, 95 L.Ed. 344.

Thus the Fifth Circuit's decision, which approved Maruzewski's invocation of the Fifth Amendment, subsequent to his plea of guilty to the same crime charged against Wilcox, subsequent to his conviction and subsequent to his prior incriminating testimony, directly collides with prior decisions of this Court and of other Courts of Appeal, necessitating the granting of Certiorari to review the judgment below.

[10]By a plea of guilty a defendant admits all the elements of the crime with which he has been charged and thereby waives several of his constitutional rights, including, at least in some measure, his privilege against compulsory self-incrimination. McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969); Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

III

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN *MESAROSH V. UNITED STATES*, 352 U.S. 1, AS TO WHETHER THE CONVICTION WAS OBTAINED ON TAINTED TESTIMONY.

This Court in *Mesarosh v. United States*, 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1, was confronted with the admission of the Solicitor General that a witness in the case gave testimony in other proceedings which was probably untrue. Therefore, the Court in passing on the integrity of a criminal trial in the Federal courts held that where the Solicitor General indicates the unreliability of a Government witness and thus wholly discredits such witness' credibility, the dignity of the United States Government will not permit the conviction of any person on the tainted testimony of such a witness.

Notwithstanding the application of the principle in *Mesarosh* to the admission by the Government prosecutor that Maruzewski "could commit perjury" were he called to testify, the Fifth Circuit called the perjury issue a "Red Herring" and omitted any reference to *Mesarosh*.

The Fifth Circuit held that Maruzewski was not entitled to claim the privilege if he were afraid that he would perjure himself when he testified at the third trial. Thus the Fifth Circuit found that the District Judge probably assumed that the witness was afraid that the testimony he would give at the third trial would reveal that he gave false testimony at the first trial.[11]

[11] *U.S.A. v. Wilcox*, Appendix A, footnote 11.

Without indulging in a game of semantics, the prosecutor's statement that Maruzewski "could commit perjury" if he testified at the third trial indicates that the Government considered Maruzewski to be an unreliable witness. Therefore Maruzewski's refusal to answer whether he was invoking the Fifth Amendment because of a fear of being charged with perjury taken together with the Government's own admission that Maruzewski could commit perjury has so "poisoned the water in this reservoir [that] the reservoir cannot be cleansed without first cleaning it of all impurity." *Mesarosh v. United States, supra.*

Not only should certiorari be granted on the basis of conflict of decisions; but it should be granted also to enable this Court to exercise its supervisory jurisdiction over trial proceedings, which "polluted" the "waters of justice" by the use of a Government witness whose credibility was placed in issue by the Government. *Mesarosh v. United States, supra.*

CONCLUSION

For the foregoing reasons and authorities, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

HARRY W. PREBISH
1207 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

and

RICHARD M. GALE
518 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

By _____
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was mailed to the Solicitor General, Department of Justice, Washington, D.C., this ____ day of November, 1971.

_____

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27370

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES MELVIN WILCOX,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(August 9, 1971)

Before BROWN, Chief Judge, GOLDBERG and CLARK, Circuit Judges.

BROWN, Chief Judge: This is a Fifth Amendment case of unusual dimensions. Typically either the prosecution is trying to compel testimony from a witness or the defendant is asserting that the witness should invoke the privilege against self-incrimination.[1] Here, however, for the first time we have been able to discover, the defendant Wilcox sought to force Government witness Maruzewski to

[1]This has ordinarily proved unavailing. See, e.g., Poole v. United States, 9 Cir., 1964, 329 F.2d 720; Hudson v. United States, 5 Cir., 1952, 197 F.2d 845; Taylor v. United States, 2 Cir., 1907, 152 F. 1; VIII Wigmore on Evidence, §§ 2196, 2270 (McNaughton Ed. 1961).

testify in person, even though the latter sought and judicially received the protection of the Fifth Amendment. We think Maruzewski's successful invocation of the privilege and the consequent use of his earlier testimony from a prior trial deprived Wilcox of none of his constitutional rights and therefore affirm his conviction.

I. In the Beginning

In 1967 Wilcox was convicted by a jury of transferring counterfeit Reserve Notes with knowledge of their unauthenticity.[2] During that trial, Maruzewski, the Government's chief witness and the party to whom Wilcox allegedly had transferred the counterfeit notes, gave testimony which gravely inculpated both Wilcox and himself. Maruzewski testified that he had met Wilcox in 1963, in Fort Lauderdale, Florida, where Maruzewski was then renting a room from Wilcox. As a result of this landlord-tenant status they established "a social acquaintance," which amounted primarily to mere "social talk." During some of their conversations, the subject of counterfeit currency "just popped up every once in a while," with Wilcox each time being the instigator. Once Wilcox actually produced a counterfeit $20.00 bill, showed it to Maruzewski, and asked him if he were interested in making a deal. Consequently the two men entered into an arrangement whereby Maruzewski would be supplied the bills from Wilcox, on a consignment basis. This meant that Wilcox would absorb the initial expense of acquiring the bills, and that then Maruzewski would receive and pass them. He would subsequently return Wilcox's investment in the bills, and whatever sum remained would be divided equally between them.

[2] This is made a criminal offense under 18 U.S.C.A. § 473.

Maruzewski was forwarded $10,000 in counterfeit currency, all in twenty dollar bills. He then began his sojourn as a spendthrift. This journey took him to Louisiana, as he had been directed by Wilcox to stay out of the Florida area when passing the bills. Eventually he was apprehended by federal agents in Detroit, Michigan. At the time of his arrest, he was still in possession of some of the illicit currency.

Subsequently, Maruzewski was returned to Fort Lauderdale to assist in the investigation and apprehension of Wilcox. Once there, he contacted Wilcox by telephone, the call being made from police headquarters, and, with Maruzewski's permission, being recorded by federal agents. This conversation, too, contained incriminating matter which was read to the jury.

Pursuant to that telephone conversation, Maruzewski went to Wilcox's house. He was accompanied by an agent Rivers, who posed as "Mad Dog," an alleged friend of Maruzewski. During this visit Maruzewski handed a number of counterfeit bills to Wilcox, who accepted them and put them in an envelope. All of the action and conversation occurred directly in front of Agent Rivers; and he verified and corroborated all of Maruzewski's testimony concerning the meeting.

At the time he testified, Maruzewski had already pleaded guilty as an accomplice to the counterfeiting charge here in dispute. Also, he had already been convicted and paroled. At that time he was serving a sentence in a state prison for another unrelated, intervening counterfeiting conviction.[3]

---

[3]Because Maruzewski received this state conviction the federal authorities have revoked his parole in the instant offense and have placed a detainer on him.

Primarily as a result of Maruzewski's devastating testimony, much of which was corroborated by one or more secret service agents, Wilcox was convicted of the counterfeiting charge. On appeal this Court reversed his conviction and remanded for a new trial.[4]

II. The Witness Takes the Fifth

In accordance with our mandate, a new trial was held, but it terminated in a mistrial almost immediately because counsel for one of the parties mentioned in his opening argument to the jury that Maruzewski was not present and would not appear to testify.

Subsequently when this case came on to be tried for the third time the Trial Judge was fully cognizant of the witness's reluctance to testify, for it was again brought to his attention by Government counsel prior to the trial. Knowing this, the Court convened a post-voir dire, pretrial conference to attempt to determine whether the witness did intend to invoke the privilege against self-incrimination, and whether the witness had a valid reason for doing so.

At this hearing Maruzewski was represented by court-appointed counsel. Out of the presence of the jury, he was subjected to an examination by the Court and counsel for the Government and Wilcox. Following the advice of his attorney Maruzewski invoked the Fifth Amendment to virtually all of the questions which were propounded. In

[4]Wilcox v. United States, 5 Cir., 1967, 387 F.2d 60. We reversed and remanded the first conviction because prejudicial error had been committed during the cross-examination of certain character witnesses, a matter totally unrelated to the issues before us on this appeal.

conclusion the Judge found that: (i) Maruzewski would claim the Fifth Amendment privilege against self-incrimination at the prospective trial on the merits,[5] (ii) that he could validly do so without being contemptuous, (iii) as a result, the witness need not take the witness stand, and (iv) his testimony from the first trial could be introduced to the jury instead.

III. Prior Testimony Used Against Accused

Thus, at Wilcox's third trial, the witness was not called to testify, and his testimony from the first trial was read into the record before the jury. Wilcox was again convicted, and he appeals.

In an effort to sustain his burden Wilcox presents four arguments: [i] the Court erroneously believed that the witness "had an absolute right to refuse to testify [by merely saying that he was] invoking the Fifth Amendment," and that as a result of this incorrect interpretation of the extension of the privilege the Judge tendered incorrect admonitions, and incorrect advice, to the witness at the most crucial time possible — when the witness was attempting to decide whether to testify or to invoke the privilege, [ii] It is the duty of the Court to do everything reasonably within his power to compel a witness to testify,

[5] Despite the many cases in which the courts have ruled on the right of a witness in a criminal trial to invoke the Fifth Amendment privilege against self-incrimination after he has already testified at a prior judicial proceeding, we have not found one which, on the merits, is identical to the case at bar. See VIII Wigmore on Evidence, §§ 2250-2284 (McNaughton Ed. 1961) for an exhaustive compilation of these cases. In virtually all of the other cases the first convocation was either a grand jury investigation or special Senate committee hearing, or a criminal trial in which the witness had been awarded the supreme protection of a special immunity provision or other executive or legislative immunity.

even to the point of threatening him with contempt, but in this case the Court instead, "in effect, encouraged the witness not to testify; by telling him to invoke the Fifth Amendment so he could avoid testifying and at the same time avoid any contempt proceedings against him." [iii] Since the witness had already pleaded guilty to, and had already been convicted of, the same offense as is here in question, he had already fully incriminated himself with respect to that matter, and he was estopped from invoking the Fifth Amendment in regard to any aspect of that transaction. And [iv] as the possibility of perjury in the giving of testimony is not a valid basis upon which one may claim the privilege, it was error for the Court, upon learning from Government counsel that Maruzewski "could commit perjury" if he should testify again, not to have made an in-depth inquiry to determine whether this was the witness's reason for refusing to testify.

IV. Determining Likely Incrimination Short of Actual Incrimination

Considering first Wilcox's major contention — that Maruzewski should not have been permitted to invoke the privilege against self-incrimination at the third trial until (i) the Trial Judge had first made a far more searching inquiry than he had conducted to determine the validity of the witness's apprehension of incrimination, and until (ii) the Court had asserted substantial pressure on the witness, by utilizing all of the means at his disposal, including his contempt powers. The key question then becomes whether the Judge properly determined that the protection of the Fifth Amendment was proper for the witness here.

The best illustration of how the Trial Judge should determine whether the privilege against self-incrimination can rightfully be invoked is Hoffman v. United States, 1951, 341 U.S. 479, ___ S.Ct. ___, 95 L.Ed. 1118. There the petitioner had refused to obey a court order to answer certain questions in a grand jury investigation into violations of a large number of federal statutes, questions largely dealing with whether the petitioner was acquainted with or knew the whereabouts of one William Weisberg. The Court held that it is for the Trial Judge to decide whether using the privilege is justified, yet pointed out the crucial difficulty in making this determination:

> "However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee.".

99 L.Ed. at 1124.

Since the Court then cannot directly inquire of the witness as to the nature of the danger he senses, how should it then proceed? Hoffman provides the guidelines:

> "To sustain the privilege, it need only be evident from the implications of the question in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculi-

arities of the case as by the facts actually in evidence. See Taft, J., in Ex parte Irvine, 74 F. 954, 960 (CC SD Ohio 1896)."[6]

The Court then went on to analyze the "circumstances which the District Court should have considered in ruling upon petitioner's claim of privilege." First the Court noted that the presiding Judge was the one who had impaneled the grand jury and was intimately familiar with the purposes of the investigation. Since Weisberg was being sought for his connection with the crimes involved and since the petitioner had admitted that he knew Weisberg, the questions would have a strong possibility of implicating the petitioner for some of the crimes under investigation. Furthermore this conclusion of potential incrimination was buttressed by the Judge's knowledge that the petitioner had a long police record and was widely recognized as a key member of the organized criminal underworld. Therefore, "in this setting it was not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate. Temple v. Commonwealth, 75 Va 892, 898 (1881), cited with approval in Counselman v. Hitchcock, 142 U.S. 547, 579, 580, 35 L.Ed. 1110, 1119, 1120, 12 S.Ct. 195, ——, —— (1892)." 95 L.Ed. at 1125.

---

[6]Stated less broadly, "It must appear to the Court from the character of the question, and the other facts [already] adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime." Ex parte Irvine, S.D. Ohio, 1896, 74 F. 954, ——. See also United States v. Coffee, 3 Cir., 1952, 198 F.2d 438, 440: Is "it impossible to say from the questions propounded in the light of the circumstances disclosed, that they could have been answered with entire impunity?"

So our inquiry must be: Did the Judge truly have a basis in fact for thinking that by answering, the witness would expose himself to a substantial danger of incrimination? We believe that he did.

Here the District Judge was the same Judge who had been on the bench during Wilcox's previous two trials, so he was acquainted with the subtleties and intricacies of those prior proceedings which might have an effect on Maruzewski. Besides being aware of the dramatic testimony which Maruzewski had given at the first trial, the Court also knew that he had been convicted in the interim of still another counterfeiting offense. Furthermore, the Court was aware that counsel had advised Maruzewski that there were other offenses for which he could be prosecuted, that Maruzewski's parole had been revoked and that a detainer had been placed on him. He was further cognizant of the Government's adamant refusal to disclose whether or not it had plans to prosecute Maruzewski further after Wilcox's trial.[7] Also, the Judge's acquain-

[7] "[BY COUNSEL FOR MARUZEWSKI]:

Q Have any other prosecutions been instituted against you by the Federal Government other than the one for which you did serve time or for which you were paroled and for which your parole has now been revoked?

A No.

Q Has anyone advised you from the Government or any other source that there is an intention to further prosecute you in connection with counterfeiting?

A Not at this point, no.

Q Not up to this point?

A No.

* * *

THE COURT:

Mr. Prebish [Defense Counsel], I take the position that you have had the disclosure that he consulted with his attorney and his attorney advised him of the possible criminal prosecution and that he has a well-founded fear of being subjected

tance with Maruzewski in the prior trial gave him knowledge that Maruzewski was a man of disreputable background and that his "[c]hief occupation [has] involved the evasion of * * * criminal laws." Hoffman, supra, 99 L.Ed. at ____. Finally the Government conceded that it would seek to elicit essentially the same testimony as Maruzewski revealed in the first trial.[3]

Thus we reject Wilcox's contention that the Court should have conducted a more factually detailed inquiry into whether "the witness feared further prosecution by

---

to criminal prosecution; and I further take the position for me to require him to disclose the details of these things would be a violation of his Fifth Amendment rights in themselves.

[DEFENSE COUNSEL]:

May I just offer to proffer one other statement?

THE COURT:

All right, sir.

[DEFENSE COUNSEL]:

I proffer this through Mr. Orlach [Government Counsel]. I would either ask Mr. Orlach to state in the record or I would like to call him as a witness to testify that he has no knowledge of any kind that there is any intention on the part of the Government at this time to prosecute the witness for any crime that might be involved as a result of his testimony.

[GOVERNMENT COUNSEL]:

I don't see the relevancy and I would object to being required to furnish that information.

THE COURT:

I will sustain the objection."

THE COURT:

"Does the Government propose to ask him any different or other questions than those which were asked on the first examination?

[GOVERNMENT COUNSEL]:

The questions will not be the exact questions, but the questions will be along the same line, to cover the same material that was covered in the original examination."

the Government for acts involving violations of the counterfeiting laws or for any other crime — without the requirement that the witness specify the crime." Certainly the Judge in this case had as much, if not more, information about possible incrimination of the witness as did the Judge in Hoffman. So such an inquiry was unnecessary in light of what the Judge already knew. Furthermore such an inquiry would be impermissible under Hoffman and Malloy v. Hogan, 1964, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 for it in itself would force the witness to specify, identify or call attention to other crimes for which he might be charged. We need not discuss here the difficult problem of how a Judge can determine the appropriateness of the Fifth Amendment privilege when he lacks the clear-cut circumstances in this case. That delineation must await another day and case.

Hoffman reveals also why this case is distinguishable from the often-arising situation in which the witness has been given immunity if he testifies. It is a truism that if one has immunity he cannot be prosecuted and if so, he has no fear of incrimination. Once the Judge knows this, his Hoffman analysis is complete — the witness must testify for he faces no incriminatory dangers. We thus find inapposite the analogy to Mason v. United States, 10 Cir., 1969, 408 F.2d 903, and Wilcox's stress on the need for the Trial Judge to use contempt, or the threat thereof, to persuade the witness to relinquish his Fifth Amendment claim. In Mason the Court cited the witness for contempt, but only after immunity had been granted.[1]

[1] In Mason three witnesses testified at the trial of a fourth party. The case was remanded for a second trial and all three witnesses refused to testify, claiming instead their right to invoke the Fifth Amendment. They were immediately granted full immunity under a federal statute, but they still refused to testify. The court halted the trial, appointed counsel to assist the recalcitrant witnesses, and interroga-

Wilcox contends that Mason calls for the pressure of contempt and failing its assertion, the prior testimony of a live, present but unwilling witness may not be used. This claim ignores a number of important factors. First, the Judge is present as the embodiment of the Constitution, charged with the firm duty to see that the rights of all are upheld — the defendants, the witnesses and the public. Whether and to whatever extent it may be the duty of the trial judge to caution a witness about his Fifth Amendment rights, a careful one never hesitates. At that stage the judge's role of impartiality commands that he not take sides, certainly not against the witness and certainly not in a way that seeks to

---

tion was resumed. When the three still persisted in their refusal to testify the Judge cited them for contempt. As their testimony was unavailable at the second trial, the Court permitted the testimony which they had given at the first trial to be read to the jury. All of these actions of the trial court were upheld on appeal.

The grant of immunity under the federal statute to the witnesses in Mason is coextensive with the protection afforded under the Constitutional privilege itself. Counselman v. Hitchcock, supra; Brown v. Walker, 1896, 161 U.S. 591, 26 S.Ct. 370, 40 L.Ed. 819; Heike v. United States, 1913, 217 U.S. 423, 30 S.Ct. 539, 54 L.Ed. 821, as to both federal and state prosecutions, Reina v. United States, 1960, 364 U.S. 507, 81 S.Ct. 260, 5 L.Ed.2d 249. Since the granting of immunity is not a judicial function, but it is an executive or legislative power, United States v. Ford, 1878, 99 U.S. 594, — S.Ct. —, 25 L.Ed. 399; Ullman v. United States, 1955, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511, a grant of immunity under a federal statute, as was given to the witnesses in Mason, virtually decides for the Court whether to permit the invocation of the privilege. In fact, the decision whether the witness will testify or be permitted not to on grounds of self-incrimination is no longer under judicial auspices. The protection is complete, and unless the witness commits perjury while he testifies under the protection of the statute or refuses to testify despite the immunity of the statute, so as to become contemptuous, he need fear no future prosecution for the matter he reveals. In Mason therefore the invocation of the privilege was clearly inappropriate and the contempt power was rightfully called into play.

avoid the difficulties of Hoffman by urging the witness to speak. Contempt is not something lightly to be cast about. The improper use of the power or the threat of its use when the likelihood is that it might not lawfully be invoked at all degrades both the importance of the Constitutional privilege and the function of the Court. Lastly, the Judge must be sensitive to the rights of the defendant. In that action, he is aware that he must handle the asserted claim in a way that does not prejudice the defense. Knowing that a witness will claim the Fifth Amendment, it becomes reversible error to allow the Government to call the witness in order to account for his absent testimony. See San Fratello v. United States, 5 Cir., 1965, 340 F.2d 560. There was no place here for contempt or the threat of it.

Both state and federal Governments have long been able to procure information through testimony otherwise within the privilege of the Fifth Amendment, by granting immunity under a statute enacted specifically for this purpose. These statutes grant either transactional or use immunity. The most recent discussion on these two classifications of immunity is Mr. Justice Brennan's dissent in Piccirillo v. State of New York, 1971, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— [No. 97, January 25, 1971], cert. dism'd as improvidently granted. See also, Ziccarelli v. New Jersey Comm. of Investigation, 1971, cert. granted, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— [No. 91, ——— ——, 1971]; Sarno v. Illinois Crime Investigating Comm., 1971, cert. granted, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— [No. 565, ——— ——, 1971]; The Organized Crime Control Act, 1970, 39 L.W. 23 ("use immunity"); and Counselman v. Hitchcock, supra ("transactional immunity").

A judicial discussion of the history and the development of immunity as it derives from the English common law is contained in the Whiskey Cases, 1879, 99 U.S. 594, —— S.Ct. ——, 25 L.Ed. 399.

For a collection of Federal Immunity Statutes see Comment, 72 Yale L.J. 1568 (1963).

V. Inquiry on Further Prosecutions of Witness

Wilcox claims similarly that an area of inquiry the Court should have permitted or pursued himself was the Government's intention "concerning possible prosecution of the witness based on his [third] trial testimony," and whether "the witness invoked his privilege because of dissatisfaction with the government's revocation of his parole and the detainer placed on him."

It does not seem likely that the Government could competently have answered whether it intends to prosecute the witness for acts relating to his testimony during the current trial as the Government could not yet be certain what the witness would testify to on the third trial or which, if any, of such crimes the Executive would in its unlimited discretion undertake to prosecute. United States v. Cox, 5 Cir., 1965, 342 F.2d 167 (en banc), cert. denied sub nom. Hauberg v. Cox, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700. See also United States v. Varner, 5 Cir., 1971, ____ F.2d ____ [No. 29513, Jan. 28, 1971] (concurring opinion). And although it is possible that the Court might have been able to inquire whether the granting or reneging on claimed governmental promises had anything to do with the witness' reticence, see Malloy v. Hogan, supra, nevertheless the record shows that the Court had ample reason impliedly to find that Maruzewski was not being recalcitrant out of spite toward the Government.

VI. Perjury, The Red Herring

Wilcox also suggests that Maruzewski had made false statements to secret service agents and that the Government knew this because it pointed out that Maruzewski "could commit perjury" were he called to testify.[10] So the argument is a dual one. First, it suggests that the Court should have explored the meaning of this remark before it could decide the propriety of the Fifth Amendment

[10]The issue of perjury, as it is before us now, entered this case during the pretrial conference when the Court and Counsel were discussing the possible exceptions to a witness's right to invoke the privilege against self-incrimination. Wilcox argues that the following conversation expressly indicates that the Government has overtly admitted that Maruzewski did perjure himself at the first trial:

"THE COURT:

Having testified one time, I don't think he can then say, "Well, I'm going to testify differently, and if I testify differently then I am going to be subject to prosecution for perjury. Therefore, I invoke the Fifth Amendment and refuse to testify.

Perjury is never shielded or protected under the veil of the Fifth Amendment.

* * *

* * * I would normally be of the opinion that having once testified he has waived the Fifth Amendment. The cases seem to hold differently. They seem to hold that even though a witness has testified in one proceeding, if the case comes back and is retried, he has an absolute right at the next trial to invoke the Fifth Amendment. That is what I say the law is.

[DEFENSE COUNSEL]:

It isn't simply a question of the witness asserting his privilege, Judge. I have looked up some law this morning on the subject. It is not quite that simple. You have to decide whether or not there is a reasonable ground to believe that his testimony will have the tendency to incriminate him. And he has already served his time on everything that is connected with this case.

[GOVERNMENT COUNSEL]:

Except for the fact that he could commit perjury."

privilege. This exploration should have been an inquiry to Maruzewski to determine if this were the reason he was claiming the protection. Second, possible perjury[11] is no excuse for not testifying and will not justify the privilege. Appellant relies heavily on United States v. Orta, 5 Cir., 1958, 253 F.2d 312, to convince us that Maruzewski cannot claim the protection of the Fifth Amendment either for his alleged prejurious actions at the prior trial or out of apprehension of committing perjury at the third trial. But this obviously correct principle is so often misunderstood.

In Orta, the defendant was charged with having committed perjury at a grand jury investigation. During his trial he claimed that he had testified under the compulsion of a subpoena, and that he had not been advised of his constitutional rights, which was of paramount importance as he was not versed in the English language. The District Court held a hearing and suppressed Orta's grand jury testimony. This Court reversed and remanded and held that under no circumstances can a witness commit perjury and then successfully claim that the Constitution affords him protection from prosecution for that crime. But Orta most definitively does not hold that he would have been precluded from invoking the Fifth Amendment if he had been asked whether he

[11] The discussion of perjury in the pretrial conference, see note 10, supra, is admittedly ambiguous. That is, the colloquy does not clearly show whether (i) the witness was afraid that he would perjure himself when he testified at the third trial or (ii) the witness was afraid that the testimony he gave at the third trial would show that he gave false testimony at the first trial. We assume that the Trial Judge believed that (ii) existed because his exchange with counsel shows that he realized that (i) was not a grounds for taking the Fifth Amendment. And under Hoffman the Judge could probably not inquire any further than he did about the tendency of the testimony to show perjury at the first trial.

had committed perjury at the grand jury investigation. This could be no more clearly demonstrated than in Glickstein v. United States, 1911, 222 U.S. 139, ___ S.Ct. ___, 56 L.Ed. 128 where a bankrupt, testifying under the immunity of a special section of the Bankruptcy Act, gave perjured testimony. The Court stated:

> "* * * It is undoubted that the constitutional guaranty of the 5th Amendment does not deprive the lawmaking authority of the power to compel the giving of testimony, even though the testimony, when given, might serve to incriminate the one testifying, provided immunity be accorded, the immunity, of course, being required to be complete; that is to say, in all respects commensurate with the protection guaranteed by the constitutional limitation."
>
> * * *
>
> "* * * [t]he sole question is, Does the statute, in compelling the giving of testimony, confer an immunity wider than that guaranteed by the Constitution?"

222 U.S. at 142, ___ S.Ct. at ___, 56 L.Ed. at 130.

The Court held that it did not; thereby establishing that special legislative immunity would not excuse a witness from prosecution for perjury which he committed while testifying to past offenses, for which acts he had been granted immunity.

Had the Judge made the inquiry requested, he would in effect be asking Maruzewski "Did you lie in the first trial?" An affirmative answer would clearly form a link in the chain of a possible future prosecution and it is

clear therefore that the protection of the privilege was appropriate. This is different from the Glickstein situation, for there the witness had nothing to fear from telling the truth. He had immunity and thus no danger of incrimination when he testified. His testimony thereby was not protected. And so when a witness is asked a question that could show that he had already committed a crime, i.e., perjury at a prior trial, his refusal to answer is permissible almost by the definition of self-incrimination. He is still criminally accountable for his perjury, but he may not be convicted out of his own mouth over his claim of privilege. Thus the aphorism that one cannot take the Fifth Amendment on the ground that if he testifies he will perjure himself applies only as an excuse for not testifying initially. It does not mean that having once testified, the Fifth Amendment is not available to avoid giving further testimony which might expose the witness to substantial risk of prosecutions growing out of the prior testimony.

VII. Prior Testimony As Waiver

Wilcox also contends that Maruzewski's voluntary testimony at the first trial is a waiver of any claim to Fifth Amendment protection at a subsequent trial. This is simply a paraphrase of all that has gone before. In Rogers v. United States, 1950, 340 U.S. 367, ___ , ___ S.Ct. ___, 95 L.Ed. 344, ___ , the Supreme Court observed:

> "Requiring a full disclosure of details after a witness freely testifies as to a criminating fact does not rest upon a further 'waiver' of the privilege against self-incrimination. Admittedly

> [the witness] had already 'waived' her privilege of silence when she freely answered criminating questions * * * [but] the court was required to determine, as it must whenever the privilege is claimed whether the question presented a reasonable danger of further crimination in light of all the circumstances, including any previous disclosures. As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further crimination."

Although one might conclude that there was a "waiver" as to the exact words stated on the first trial, this does not eliminate the problem. For taking the stand would give the witness little control over the scope or content of examination — direct or cross. And in the circumstances of this case and the witness's life of crime, taking the stand would expose him to perils when new or different words came out.[12]

[12] Cf. United States v. Mobley, 5 Cir., 1970, 421 F.2d 345 which emphasized that no further incrimination by the witness was possible. 421 F.2d at 351 n.5.

An analogous argument is derived from Romero v. United States, 2 Cir., 1957, 249 F.2d 371, 375 which states: "It is well established that once a witness has been convicted for the transactions in question, he is no longer able to claim the privilege of the Fifth Amendment and may be compelled to testify." This is nothing more than the truism that after one has been found guilty, all possible incrimination has passed and the privilege is no longer available. Contrary to Wilcox's contention, this principle is inapplicable here. Admittedly Maruzewski pleaded guilty and was convicted of the same offense charged against Wilcox. And if the circumstances of the case showed that the only possible relevance his testimony would have would be in relation to the offenses for which he had already been convicted, then there would be no potential incrimination and thus no privilege. But as we have seen, Maruzewski has far more to fear than the offense for which the Government has won a conviction.

VIII. The Myth of "Absolute Privilege"

Since we have decided that the witness could properly claim the Fifth Amendment privilege, we can quickly dismiss Wilcox's assertion that the Judge committed error in telling Maruzewski that he had an "absolute right" not to testify. Wilcox takes this to mean that the Judge was saying that the witness is the arbiter of the propriety of the privilege. Our reading of the proceedings however indicates that the Judge simply was speaking in colloquial terms and merely was indicating that the witness had the right to invoke the privilege any time that the Judge had determined that it was proper to do so. This of course is the correct statement of the law, and so this contention goes for naught.

IX. Sixth Amendment Confrontation

Wilcox strenuously argues that Maruzewski cannot take the Fifth Amendment because under the Sixth Amendment Wilcox has the right to confront Maruzewski and through new evidence and cross-examination tactics to impeach his prior testimony. When the Judge permitted the prior testimony to be introduced into evidence he lost the means of destroying the effectiveness of the witness. We find that Mobley, supra, compels a conclusion contrary to that asserted by Wilcox on this point.

In Mobley a co-defendant, Oliver, pleaded guilty at both trials to charges of robbery, theft, assault, and murder. At the first trial Oliver testified for the Government, where he admitted his guilt and inculpated Mobley. At the second trial the Government again called Oliver

to testify, but after having taken the witness stand, he refused to testify. Consequently the complete transcript of his former testimony was admitted into evidence and read to the jury.

Mobley claimed that the introduction of this "infeced" testimony from "an antecedent trial" violated the confrontation clause of the Sixth Amendment. We held that it did not. Following our recapitulation of the testimony from the first trial, which the witness had given in great depth and detail, we said:

> "We find no violation here of the principles expressed in Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895) and Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 255 (1968), relative to the rights of an accused to confrontation and the opportunity to have the jury assess the demeanor and credibility of a witness. Both of these requirements were satisfied by the former trial, where the witness was under oath and throughly examined on both direct and cross-examination * * *"

421 F.2d at 350.

> "'The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.' [Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409] 156 U.S. at 243 * * *"

421 F.2d at 350.

In Mobley we fully discussed the distinctions between preliminary hearings[1] and a "full fledged" trial, "at which the same counsel who later represented appellant in the second trial, [had] fully cross-examined the witness [at the first trial] * * *" 421 F.2d at 350. Here as in Mobley, Maruzewski was examined and vigorously cross-examined at the first trial. The receipt of this testimony at a later trial after he subsequently took the Fifth Amendment is no violation of the confrontation clause because Maruzewski is

> "[n]o less unavailable than [he would have been in instances of] death or absence from the Country or physical inability to speak."

421 F.2d at 351.

X. A Tagend

After Wilcox had rested his case, Court was recessed for lunch. Upon the Court's reconvening, the Government sought to reopen its rebuttal.[2] Accordingly, Wilcox was

[1] See Barker v. Page, 1968, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255; Pointer v. Texas, 1965, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923.

[2] The following proceeding took place:

"[GOVERNMENT COUNSEL]:

At this time we move the Court for leave to reopen the defendant's case for the purpose of asking the defendant a question as to whether or not he has been convicted of a felony.

THE COURT:

You don't mean to reopen the defendant's case. What you mean is to recall the defendant for further cross-examination?

[GOVERNMENT COUNSEL]:

Yes, sir, for that purpose.

recalled to the witness stand, and he was asked the single question "whether or not * * * [he had] ever been convicted of a felony." Wilcox answered this question affirmatively.

Wilcox contends that, since "the evidence of guilt in this case was not overwhelming and the Trial Judge recognized the absence of strong evidence of guilt" * * * the * * * Judge, by allowing undue emphasis on the matter of defendant's conviction of a felony, tipped the scales of justice against the defendant and as a result thereof abused his judicial discretion."

We do not agree. The reopening of a criminal case either to present omitted evidence or to add further testimony after either of the parties has rested is within the sound discretion of the Trial Court. Harrison v. United States, 5 Cir., 1968, 387 F.2d 614; Massey v. United States, 10 Cir., 1966, 358 F.2d 786; Lucas v. United States, 8 Cir. 1965, 343 F.2d 1. In a refreshing figure, "There is no iron-bound, copper-fastened, double-riveted rule against the admission of evidence after both parties have rested upon their proof and even after the jury has entered upon

---

THE COURT:

All right, sir. I will grant your motion.

[DEFENSE COUNSEL]:

Your Honor, we vigorously object.

THE COURT:

I will note an objection by the defendant. The objection is overruled and the motion is granted."

"Appellant bases this contention on the following statement made by the Court:

"Frankly, as I look at this case, I don't personally think this is a case in which the jury is going to arrive at any verdict one way or another until after there has been a considerable discussion of the evidence."

its deliberations." See Jianole v. United States, 8 Cir., 299 Fed. 496. We are also aware — but careful not to approve or disapprove here — of the rule stated in Eason v. United States, 9 Cir., 1960, 281 F.2d 818, that "* * * re-opening a case for the purpose of introducing overlooked evidence must be done with extreme reluctance because of the undue emphasis given to the introduced evidence with consequent distortion of the evidence as a whole and the possibility that such prejudice will result to the other party as to require a mistrial." 281 F.2d at 818.

There was no abuse of discretion on the part of the Trial Court here. Accordingly, this contention is devoid of merit.

AFFIRMED.

APPENDIX B

[TITLE OMITTED]

Appeal from the United States District Court for the Southern District of Florida

Before BROWN, Chief Judge, GOLDBERG and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 9, 1971.

Issued As Mandate:

APPENDIX C

[TITLE OMITTED]

Filed October 30, 1971

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX D

[TITLE OMITTED]

JUDGMENT AND COMMITMENT

On this 23rd day of January, 1969, came the attorney for the government and the defendant appeared in person and by counsel, Harry W. Prebish, Esq.

It is Adjudged that the defendant upon his plea of Not Guilty and a Jury Verdict of Guilty has been convicted of the offense of transfer and deliver counterfeit United States Federal Reserve Notes, with intent that same be passed, published and used as true and genuine notes, knowing same to be counterfeit, in violation of Title 18, United States Code, Section 473, as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, or until otherwise discharged by the process of law, it being further

ORDERED that pursuant to the provisions of Title 18, United States Code, Section 4208(a)(2), Defendant shall become eligible for parole at such time as the Board of Parole may determine, and it is further

ORDERED that execution of sentence of confinement be deferred until 9:00 a.m. February 3, 1969 at which time Defendant shall surrender himself to the United States Marshal at Miami, Florida.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ W. O. MEHRTENS

United States District Judge

The Court recommends commitment to:

_____

Clerk

No. 71-677

In the Supreme Court of the United States

OCTOBER TERM, 1971

JAMES MELVIN WILCOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
HENRY E. PETERSON,
Acting Assistant Attorney General,
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-677

JAMES MELVIN WILCOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. An earlier opinion is reported at 387 F. 2d 60.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1971. A petition for rehearing was denied on October 20, 1971. The petition for a writ of certiorari was filed on November 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a transcript of the testimony of a witness at a prior trial was admissible into evidence at

453-835—72

a retrial after the witness asserted the privilege against self-incrimination and refused to testify.

2. Whether petitioner's conviction rests upon perjurious testimony.

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the Southern District of Florida of knowingly transferring and delivering five hundred counterfeit twenty-dollar federal reserve notes to Edward Maruszewski, with intent that the notes be passed, in violation of 18 U.S.C. 473 (A. 400–401).[1] On January 23, 1969, he was sentenced to imprisonment for two years subject to the parole provision of 18 U.S.C. 4208(a)(2) (A. 403–405). The court of appeals affirmed (Pet. App. A).

The issues raised here arise out of the introduction into evidence at a retrial of petitioner of a transcript of the testimony of Edward Maruszewski at petitioner's first trial in May 1966. This transcript was admitted into evidence after Maruszewski asserted the privilege against self-incrimination and refused to testify.

1. Before the third trial[2] after Maruszewski indicated that he would claim the privilege against self-incrimination and refused to review his testimony

---

[1] "A" refers to the Appendix filed in the court below. A copy is being lodged with the Clerk of this Court.

[2] The conviction at petitioner's first trial was reversed because of error in the cross-examination of character witnesses. 387 F. 2d 60. A mistrial occurred at the second trial after there was a reference at the outset to the fact that Maruszewski would not testify (A. 9, 16).

with the prosecutor, the court appointed an attorney to represent and advise Maruszewski of his rights (A. 12, 21). Thereafter, at a pretrial hearing, the government informed the court that, while it would not ask the witness Maruszewski the exact questions asked at the first trial, it planned to cover the same material (A. 22). When the court asked the witness if he would refuse to testify under such circumstances, the witness replied that he would invoke the Fifth Amendment (A. 22–28). Defense counsel indicated that he would question the witness about new matters for the first time (A. 41–47).

At the time of the hearing, Maruszewski was incarcerated under a state charge and his parole from a previous three-year federal counterfeiting sentence had been revoked and a detainer was lodged against him (A. 29, 46–47, 154). On examination by defense counsel (A. 29–50), the witness said that, although the government had not informed him of any intention to prosecute him further for counterfeiting (A. 37), his attorney had advised him that he could be prosecuted for other counterfeiting crimes. He refused to state what particular prosecution for counterfeiting offenses his attorney had advised him were still possible (A. 49). The witness also refused, on the basis of privilege, to answer questions as to whether he had made a full disclosure to government authorities of all his lifetime activities connected with counterfeit monies (A. 29–30). When asked whether two statements that he gave to government investigators confessing his involvement in counterfeit activities were

false, he refused to answer (A. 39), but did say that he was "not necessarily" concerned with a possible perjury charge (A. 30). The court sustained the refusal of the witness to answer questions, holding that it would not require the witness to answer a question "which, in effect, would violate his Fifth Amendment rights" (A. 49, 51). It also did not require the government to state whether it intended to prosecute the witness "for any crime that might be involved as a result of his testimony" (A. 51–52).

At the conclusion of the hearing, the trial court ruled that the witness was unavailable and that his testimony at the prior trial could be introduced into evidence (A. 64). It found that there was a valid basis for the claim of privilege, noting the advice of the disinterested court-appointed counsel that the witness could be subjected to prosecution for crimes were he to testify, and that the witness would "be subject to examination and cross examination".

2. In the prior trial testimony which was then introduced and read at trial, Maruszewski stated that in November 1965 in Fort Lauderdale, Florida, he accepted five hundred counterfeit $20 bills on consignment from petitioner (A. 136–141); that he, thereafter, passed some of these bills in Jacksonville and New Orleans (A. 141); and that on December 10, 1965, he was arrested in Detroit, Michigan, with some of the counterfeit money in his possession (A. 145–147). Maruszewski also stated that on December 17, 1965, he returned to Fort Lauderdale with government agent Rivers where he telephoned petitioner (A. 148–

149); that he then introduced Rivers to petitioner as "Mad Dog" at the latter's apartment; and that he then returned approximately $600 in counterfeit bills to petitioner and also gave him $380 in genuine bills as proceeds from the distribution of other counterfeit bills (A. 151–153).

At trial, agent Rivers testified about accompanying Maruszewski to petitioner's residence with the counterfeit money; he related the conversation in which Maruszewski returned the counterfeit bills to petitioner; and he told of the arrest which occurred when they left the apartment (A. 183–192). A recording of the telephone conversation between petitioner and Maruszewski on December 17, 1965, was also introduced into evidence (Gov't Exh. 5; A. 228–229, 220).

ARGUMENT

1. The trial court did not err in admitting the transcript of the prior testimony of Edward Maruszewski into evidence. The latter's refusal to testify, whether justified or not, made him "no less unavailable than death or absence from the country or physical inability to speak." *United States* v. *Mobley*, 421 F. 2d 345, 351 (C.A. 5). See also *California* v. *Green*, 399 U.S. 149, 166.

The trial court adopted a fair procedure in determining whether the witness was "unavailable." The

---

[3] In addition, the government showed that it recovered thirty-two counterfeit $20 bills from Maruszewski at the time of his arrest in Detroit and thereafter obtained $5,160 in counterfeit bills from Maruszewski's home (A. 97–100).

court did not accept the mere statement of the witness that his testimony might be incriminatory, but held a hearing on this issue and appointed disinterested counsel to advise the witness. At this hearing, defense counsel was allowed to examine the witness and was advised that the government planned to cover the same ground in its questioning as it had in the previous trial. The court was told that Maruszewski's attorney had advised him that he could be prosecuted for other counterfeiting crimes and the government refused to state whether it planned any further prosecution of Maruszewski (A. 51–52).

To be sure, no harm to the witness was apparent from further testimony since he had already testified at the first trial and since he had previously pleaded guilty to counterfeiting charges. But, in *Malloy* v. *Hogan*, 378 U.S. 1, this Court upheld a claim of privilege where, in light of the defenses of double jeopardy and the statutes of limitations, no real harm was apparent.[4] Likewise, it has generally been held that a person who has waived his privilege of silence in one trial or proceeding may assert it as to the same matter in a subsequent trial or proceeding. *United States* v. *Miranti*, 253 F. 2d 135, 139 (C.A. 2); *In re Neff*, 206 F. 2d 149, 152 (C.A. 3); *Ballantyne* v. *United States*, 237 F. 2d 657, 665 (C.A. 5). Contra, *Ellis* v. *United States*,

---

[4] Petitioner's reliance on *Reina* v. *United States*, 364 U.S. 507, is misplaced. In *Reina* that recalcitrant witness had not only been convicted of the crime with respect to which further testimony was sought, but had been given transactional immunity. Thus he could never be prosecuted for anything about which he testified.

416 F. 2d 791, 800–805 (C.A.D.C.); see also *United States* v. *Seewald* (C.A. 2), petition for a writ of certiorari pending, No. 71–5814. An important consideration for upholding the claim of privilege is that the passage of time, as here, might have created new grounds for apprehension and that a subsequent interrogation is always different and therefore might lead to injurious disclosures not heretofore revealed nor legally barred.

Nor was there any requirement, as petitioner asserts, for the trial court to probe further into the basis of the claim of privilege by the witness. As the court below held (Pet. App. 11), such an inquiry would have been impermissible under *Hoffman* v. *United States*, 341 U.S. 479, and *Malloy* v. *Hogan*, 378 U.S. 1, "for it in itself would force the witness to specify, identify or call attention to other crimes for which he might be charged." And, as noted, the government objected to questions relating to its plans with respect to further prosecution of the witness.

In any event the issue here is not whether the witness could properly have been found guilty of contempt for refusing to testify but whether he was an "unavailable" witness. Whether or not the judge ruled correctly on the claim of privilege, the witness was, by judicial order, rendered unavailable. In this regard, it should also be noted that a threat of contempt to induce the witness to testify probably would have had little effect here since he was at the time incarcerated under a state charge and his parole from a three year federal counterfeiting sentence had also been revoked.

2. This conviction does not rest on perjurious testimony. As pointed out in the Statement, the transcript was corroborated both by the testimony of the government agent who was present when Maruszewski returned counterfeit bills to the defendant and by a recorded telephone conversation which also demonstrated petitioner's involvement in the crime.

The discussion of perjury during the pretrial hearing (A. 14–15) was a hypothetical and abstract discussion of possibilities. It does not suggest that the government was using perjured testimony. When the witness was asked whether a possible prosecution for perjury was one of the concerns that caused him to invoke the privilege against self-incrimination, he stated "not necessarily" (A. 30).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Acting Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972